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## North Carolina's H.B.2: A Case Study in LGBTQ Rights, Preemption, and the (Un)Democratic Process

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## NORTH CAROLINA'S H.B.2: A CASE STUDY IN LGBTQ RIGHTS, PREEMPTION, AND THE (UN)DEMOCRATIC PROCESS

*Mark Dorosin\**

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## I. INTRODUCTION

In 2014, community advocates in Charlotte, North Carolina, began organizing to press the city to amend its antidiscrimination ordinance to add several new protected classes, including sexual orientation, gender identity, and gender expression. After a contentious hearing where opponents argued that the change—which would allow transgender people to use public restrooms according to their gender identity—would subject women and children to “sexual predators,” the city council voted down the amendment. Undaunted, advocates worked over the next several months to elect new councilmembers and a mayor who supported LGBTQ rights. The amendments to the civil rights ordinance were then brought back before the council and passed in February 2015.

Less than a month later, the state Speaker of the House Tim Moore and the Lieutenant Governor Dan Forest, both Republicans, called a special session of the legislature to address “the bathroom issues” of Charlotte’s new ordinance. Two days later, the General Assembly convened and, in one day, passed House Bill 2 (“H.B. 2”). Governor Pat McCrory, the former mayor of Charlotte, who had earlier threatened city leaders with the specter of “immediate state legislative intervention,” signed the bill that same day.

H.B. 2, mischaracterized as “the bathroom bill,” was a sweeping anti-civil rights measure that extended far beyond the issue of access to restrooms. By narrowly defining sex as “[b]iological sex—the physical condition of being male or female which is stated on a person’s birth certificate,” the law not only denied transgender residents access to facilities based on their gender identity, but also undermined the existence of any antidiscrimination laws that included sexual orientation or gender identity and prohibited the adoption of any new local laws that would do so. And although unrelated to the Charlotte ordinance, H.B.

2 also expressly preempted any local antidiscrimination or workers' rights ordinances related to wages, benefits, leave, or protections for minors in the workforce. Additionally, the law eliminated the longstanding "public policy exception" to the state's employment-at-will jurisprudence, which authorized a state cause of action for employees who alleged they had been discharged because of illegal discrimination.

H.B. 2 immediately became the highest-profile issue in the state. The American Civil Liberties Union ("ACLU") quickly filed a lawsuit in federal court, and Roy Cooper, the Democrat Attorney General, announced that his office would not defend the State in the suit. The law also gained national notoriety, leading to boycotts and the cancellation of numerous events in the state, including a Bruce Springsteen concert, the NBA All-Star Game, and a range of collegiate sporting events. PayPal withdrew plans for a \$36 million-dollar, 400-job facility planned for Charlotte because of the law. Governor McCrory's support for H.B. 2 played a critical role in his narrow defeat by Roy Cooper in 2016. The bill was formally repealed in March 2017, although the replacement statute, H.B. 142, continues to preempt local governments from passing new local legislation to protect LGBTQ civil rights.

The legal and political struggle over H.B. 2 provides a primer on the issues of civil rights, local control, and state preemption and the particular challenges for progressive local governments in states controlled by conservative legislatures. While many tried to narrowly characterize North Carolina's experience with H.B. 2 as a debate between local control and uniformity of state law regarding access to bathrooms (the statute was regularly referred to as "the bathroom bill"), in reality, the issues and context regarding the passage, reaction to, and ultimate repeal of H.B. 2 are much deeper. At its core, H.B. 2 forced the state and nation to consider how our political processes address (or fail to address) the expansion of civil rights for historically marginalized groups; overtly discriminatory, anti-LGBTQ policymaking, rhetoric, and prejudice; and the manipulation of the democratic process.

Part II of this Article examines the passage of the Charlotte City Council's antidiscrimination ordinance. Part III discusses the legislature's response and passage of H.B. 2. Part IV describes the economic and political backlash following the law's passage. Part V details the legislature's repeal of H.B. 2. Part VI analyzes the broader political implications of the struggle over H.B. 2.

## II. THE CITY RISES: ORGANIZING TO PASS A PROGRESSIVE ANTIDISCRIMINATION ORDINANCE

The struggle for LGBTQ equality, and particularly for equal rights for transgender persons, reached a critical milestone in April 2014 when the Office of Civil Rights of the U.S. Department of Education issued *Questions and*

*Answers on Title IX and Sexual Violence* (“Q&A”).<sup>1</sup> The Q&A was a formal guidance document updating recipients of federal education funding on “key Title IX requirements.”<sup>2</sup> The document expressly stated that the antidiscrimination provisions of Title IX apply broadly:

Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation. Similarly, the actual or perceived sexual orientation or gender identity of the parties does not change a school’s obligations.<sup>3</sup>

The Q&A was the first time the federal government explicitly stated that the broad protections against discrimination extend to transgender people and to gender identity and expression.

#### *A. The Frustrated First Effort to Pass the Ordinance*

Two months later, in July 2014, Charlotte City Councilmember John Autry and community LGBTQ rights activist Scott Bishop met to discuss steps the city could take to address anti-LGBTQ discrimination.<sup>4</sup> At the time, Bishop was on the board of the Human Rights Campaign, a national LGBTQ civil rights organization. He proposed that the city expand its existing Human Relations (nondiscrimination) Ordinance<sup>5</sup> to include sexual orientation and gender expression to the list of protected classes.<sup>6</sup> According to Bishop, who had also

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<sup>1</sup> CATHERINE E. LHAMON, U.S. DEP’T OF EDUC., OFFICE OF CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>. Note these provisions, as well as a subsequent “Dear Colleague” letter, affirming that the antidiscrimination provisions of Title IX issued in 2016, were rescinded by the Trump Administration’s Department of Education in 2017. *Id.*

<sup>2</sup> *Id.* at ii.

<sup>3</sup> *Id.* at 5.

<sup>4</sup> Mark Price, *Understanding the Origin of Charlotte’s ‘Bathroom Law,’ and How It Led to HB2*, CHARLOTTE OBSERVER (July 29, 2016, 5:48 PM), <https://www.charlotteobserver.com/news/local/article92685957.html>.

<sup>5</sup> The North Carolina General Assembly has expressly authorized municipalities to establish human relations committees

devoted to (i) the study of problems in the area of human relations, (ii) the promotion of equality of opportunity for all citizens, (iii) the promotion of understanding, respect and goodwill among all citizens, (iv) the provision of channels of communication among the races, (v) dispute resolution, (vi) encouraging the employment of qualified people without regard to race, or (vii) encouraging youth to become better trained and qualified for employment.

N.C. GEN. STAT. ANN. § 160A-492 (West 2020).

<sup>6</sup> Price, *supra* note 4.

been on the board of MeckPAC, a local LGBTQ advocacy group, the Charlotte LGBTQ community began strategizing over how to expand civil rights protections in the city back in 2011, when Charlotte was preparing to host the 2012 Democratic National Convention. LGBTQ rights were a core part of the party platform that year, but Charlotte provided no antidiscrimination protections based on sexual orientation or identity.<sup>7</sup> In fact, when Bishop met with Councilmember Autry in 2014, he noted that Charlotte was one of only three of the most populous cities in the country that did not provide civil rights protections for LGBTQ persons.<sup>8</sup> Autry encouraged Bishop to pursue the idea.

Bishop spent the next several months meeting with members of the city council to discuss the idea of expanding the city's nondiscrimination ordinance and on November 24, 2014, formally presented the proposal at the city council meeting.<sup>9</sup> Accompanied by local representatives from various civil rights organizations (including MeckPAC, the LBGT Democrats, and Straight Allies Charlotte), Bishop explained that they had researched expanding the city's ordinance, had met with the city attorney and the Executive Director of the Human Relations Commission, and were now petitioning the city to add gender identity, gender expression, familial status, marital status, and sexual orientation to its existing nondiscrimination ordinances.<sup>10</sup> After some discussion among councilmembers about what those classes mean, the council agreed to have City Attorney Bob Hagemann work on the issue and bring back a draft proposal updating the city ordinance to include the protected classes.<sup>11</sup> At the time, only one board member raised a question about public accommodations and restrooms, and that was narrowly focused on potential conflicts with building codes.<sup>12</sup>

Attorney Hagemann presented the proposed amended ordinance at the city council meeting on February 9, 2015.<sup>13</sup> By this time, growing opposition to the proposed amendments, primarily from conservative religious groups, had focused concerns on the public accommodations impacts of the amendments and specifically transgender persons' access to restrooms based on their gender

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Minutes, Citizens' Forum and Business Meeting*, City Council of the City of Charlotte, North Carolina 526 (Nov. 24, 2014), [http://library.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=minutes:charlotte\\_nc](http://library.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=minutes:charlotte_nc).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 527.

<sup>12</sup> *Id.* at 531.

<sup>13</sup> *Minutes, Business Meeting*, City Council of the City of Charlotte, North Carolina 12 (Feb. 9, 2015), [http://library.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=minutes:charlotte\\_nc](http://library.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=minutes:charlotte_nc).

identity. Reflecting the outpouring of opposition the council was receiving to the proposal, Councilmember Ed Driggs said that approving the changes would “not reflect the preference democratically of many members of our society.” Mayor Dan Clodfelter replied, “with all respect, I’m glad we didn’t put *Brown v. Board of Education* to a public vote.”<sup>14</sup>

A public hearing was held on the proposed amendments on March 2, 2015.<sup>15</sup> Over 100 people signed up to speak, and the council received over 40,000 emails in the weeks leading up to the meeting.<sup>16</sup> Many of those in favor of the ordinance spoke about discrimination and violence against the LGBTQ community, including about their personal experiences with exclusion and victimization. Opponents complained that the ordinance would allow sexual predators to target women and children in public restrooms, that the law would force businesses to serve gay or transgender people, and that the proposal was immoral, irreligious, and discriminated against Christians.<sup>17</sup>

Following the long and tense debate, a motion was made to adopt the ordinance but with amended language excluding restrooms: “Notwithstanding the foregoing, the section shall not with regard to sex, sexual orientation, gender identity and gender expression apply to restrooms, locker rooms, showers and changing facilities.”<sup>18</sup> The amended ordinance was voted down 6–5, with two of the strongest supporters of the original ordinance voting against, because they refused to accept the more limited measure.<sup>19</sup>

### *B. A New City Council Passes the Antidiscrimination Ordinance Amidst Growing State Resistance to LGBTQ Rights*

In the wake of this outcome, supporters of the antidiscrimination ordinance turned their focus to the municipal elections in November. The issue became a central focus of the campaigns for city council and mayor, with

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<sup>14</sup> *Id.* at 17.

<sup>15</sup> *Minutes, Business Meeting*, City Council of the City of Charlotte, North Carolina 179 (Mar. 2, 2015), [http://library.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=minutes:charlotte\\_nc](http://library.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=minutes:charlotte_nc).

<sup>16</sup> Ely Portillo & Mark Price, *Charlotte LGBT Ordinance Fails 6–5 in Contentious Meeting*, CHARLOTTE OBSERVER (Mar. 2, 2015, 10:17 AM), <https://www.charlotteobserver.com/news/local/article11908907.html>.

<sup>17</sup> *Id.*; see also *Minutes*, *supra* note 15, at 182–215.

<sup>18</sup> *Minutes*, *supra* note 15, at 216.

<sup>19</sup> *Id.* at 224–25 (Councilmember Mayfield: “I personally cannot support incremental steps. This for me at the end of the day is a conversation about moving forward protections for all our citizens.” Councilmember Autry: “I absolutely support the ordinance as it was drafted . . . I do not support the amendment because it denies equal protection to all of our citizens.”).

candidates specifically asked about their position on the ordinance.<sup>20</sup> As a result of community organizing and political advocacy by supporters of expanding LGBTQ rights, two new councilmembers, who favored amending the antidiscrimination ordinance, were elected.<sup>21</sup> In addition, former county commissioner Jennifer Roberts, a strong supporter of LGBTQ rights, was elected mayor. She announced at her swearing in that she planned to reopen the debate on the ordinance.<sup>22</sup>

Less than two weeks later, North Carolina Governor Pat McCrory, a Republican, sent a letter to Roy Cooper, the state's Attorney General—a Democrat who had already announced plans to run against McCrory in 2016—asking him to join his counterpart in South Carolina in an amicus curiae brief in support of a Virginia school district that had been sued for discrimination by a transgender student over its policy requiring him to use an “alternative” restroom at the high school.<sup>23</sup> The lawsuit, which had been filed by the ACLU on behalf of student Gavin Grimm, challenged the Gloucester County School Board's decision to restrict the use of the student gender-specific restrooms to students “of ‘the corresponding biological gender.’”<sup>24</sup> McCrory's letter to Cooper seemed to be in response to the U.S. Departments of Justice and Education filing an amicus brief in support of the student. “The Obama administration has joined with the ACLU in an attempt to force local school districts to open sex-specific locker rooms and bathrooms to individuals that are not of that biological sex. . . . It must be stopped before our state's schools are impacted . . . .”<sup>25</sup> McCrory, the former mayor of Charlotte, was on the city council there in 1992 and, at that time, voted against a proposal to expand the city's antidiscrimination ordinance to include sexual orientation.<sup>26</sup> When Cooper refused to sign onto the brief,

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<sup>20</sup> Steve Harrison, *Charlotte City Council Candidates Pledge Support for LGBT Issues*, CHARLOTTE OBSERVER (Aug. 11, 2015, 8:44 PM), <https://www.charlotteobserver.com/news/local/article30789966.html>.

<sup>21</sup> Greg Lacour & Emma Way, *HB2: How North Carolina Got Here*, CHARLOTTE MAG. (Mar. 30, 2017), <https://www.charlottemagazine.com/hb2-how-north-carolina-got-here-updated>.

<sup>22</sup> Erik Spanberg, *New Charlotte Mayor Takes Office*, CHARLOTTE BUS. J. (Dec. 7, 2015, 9:39 PM), [https://www.bizjournals.com/charlotte/blog/queen\\_city\\_agenda/2015/12/new-charlotte-mayor-takes-office.html](https://www.bizjournals.com/charlotte/blog/queen_city_agenda/2015/12/new-charlotte-mayor-takes-office.html).

<sup>23</sup> Colin Campbell, *McCrory Calls on Cooper to Oppose Transgender Bathroom Lawsuit*, NEWS & OBSERVER (Raleigh, N.C.) (Nov. 23, 2015, 11:58 AM), <https://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article46027530.html>.

<sup>24</sup> T. Rees Shapiro, *Transgender Student Files Lawsuit Against Schools over Bathrooms*, WASH. POST (June 11, 2015), [https://www.washingtonpost.com/local/education/transgender-student-files-lawsuit-against-schools-over-bathrooms/2015/06/11/a4ed8090-106f-11e5-9726-49d6fa26a8c6\\_story.html](https://www.washingtonpost.com/local/education/transgender-student-files-lawsuit-against-schools-over-bathrooms/2015/06/11/a4ed8090-106f-11e5-9726-49d6fa26a8c6_story.html).

<sup>25</sup> Campbell, *supra* note 23.

<sup>26</sup> Portillo & Price, *supra* note 16.



McCrory moved to do so himself “in his capacity as Governor.”<sup>27</sup> The high-profile coverage of this issue was the beginning of the emergence of LGBTQ rights as the defining issue in the 2016 election and would play a critical role in McCrory’s defeat.

The Grimm lawsuit, the Obama administration’s aggressive defense of LGBTQ rights for students, and the concomitant conservative pushback gave this issue a high-profile national context. In January 2016, the Republican National Committee adopted a *Resolution Condemning Governmental Overreach Regarding Title IX Policies in Public Schools*,<sup>28</sup> which laid out a state government preemption strategy that would shortly unfold in North Carolina, making it ground zero for the battle over LGBTQ rights. The resolution stated that a person’s sex is “identified at birth by a person’s anatomy, recorded on their birth certificate” and that gender identity is not protected by federal antidiscrimination law.<sup>29</sup> The resolution called on the Department of Education to rescind its Title IX guidance regarding transgender students, encouraged “State Legislatures to recognize that these Obama *gender identity* policies are a federal government overreach,” and most notably, encouraged “state legislatures to enact laws that protect student privacy and limit the use of restrooms, locker rooms and similar facilities to members of the sex to whom the facility is designated.”<sup>30</sup> Within two months, the North Carolina General Assembly would be all too happy to comply.

The new Charlotte City Council moved quickly to reconsider the original antidiscrimination ordinance with the inclusion of the restroom provision. Following a public forum on the ordinance on February 1, 2016, the council received an updated presentation on the proposal at its meeting on February 8. Reflecting the primary concerns that had been raised by opponents, nearly all of the discussion focused on the restroom issue. The council then agreed to schedule the vote for its meeting on February 22.<sup>31</sup>

State officials were closely monitoring the events unfolding in Charlotte. The night before the scheduled vote, Governor McCrory sent an email to two Republican councilmembers asserting that this action would impact more than

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<sup>27</sup> Colin Campbell, *McCrory to Join Transgender Bathroom Lawsuit Without Cooper’s Help*, CHARLOTTE OBSERVER (Nov. 25, 2015, 6:50 AM), <https://www.charlotteobserver.com/news/politics-government/article46389420.html>.

<sup>28</sup> REPUBLICAN NAT’L COMM., RESOLUTION CONDEMNING GOVERNMENTAL OVERREACH REGARDING TITLE IX POLICIES IN PUBLIC SCHOOLS (2016), [https://prod-static-ngop-pbl.s3.amazonaws.com/media/documents/Resolution\\_Title\\_IX%20\\_Overreach.pdf](https://prod-static-ngop-pbl.s3.amazonaws.com/media/documents/Resolution_Title_IX%20_Overreach.pdf).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Minutes, Business Meeting*, City Council of the City of Charlotte, North Carolina 899–900 (Feb. 8, 2016), [http://library.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=minutes:charlotte\\_nc](http://library.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=minutes:charlotte_nc).

just Charlotte and reiterated concerns that extending public accommodations protections to transgender persons would put residents at risk of sexual predators:

It is not only the citizens of Charlotte that will be impacted by changing basic restroom and locker room norms but also citizens from across our state and nation who visit and work in Charlotte. . . . This shift in policy could also create major public safety issues by putting citizens in possible danger from deviant actions by individuals taking improper advantage of a bad policy.<sup>32</sup>

Charlotte State Representative Dan Bishop said that he “didn’t want to go to war with Charlotte,” but that he wanted to protect small businesses and indicated that if the measure passed, the General Assembly would likely act to preempt the city’s action.<sup>33</sup> This was not Bishop’s first assertion of the legislature’s interest in restricting LGBTQ rights. Three weeks after the city council’s consideration of the ordinance in 2015, Bishop (along with fellow Charlotte representative Jacqueline Schaffer) co-sponsored the North Carolina Religious Freedom Restoration Act, a state law modeled on federal legislation that proponents claimed was designed to protect people who exercise their religious beliefs, but that opponents argued would allow businesses to discriminate against LGBTQ persons.<sup>34</sup> Ironically, Governor McCrory, observing the backlash from the state and national business community following Indiana Governor (now–Vice President) Mike Pence signing identical

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<sup>32</sup> Steve Harrison, *Charlotte City Council Approves LBGT Protections in 7–4 Vote*, CHARLOTTE OBSERVER (Feb. 22, 2016, 3:06 PM), <https://www.charlotteobserver.com/news/politics-government/article61786967.html>.

<sup>33</sup> *Id.*

<sup>34</sup> Tim Funk & Jim Morrill, *NC Considers Indiana-Like Religious Objection Legislation*, CHARLOTTE OBSERVER (Mar. 30, 2015, 8:54 PM), <https://www.charlotteobserver.com/news/politics-government/article16956950.html>. House Bill 348 provided that

(a) State action shall not burden a person’s right to exercise of religion, even if the burden results from a rule of general applicability, unless it is demonstrated that applying the burden to that person’s exercise of religion in this particular instance: (1) Is essential to further a compelling governmental interest; and (2) Is the least restrictive means of furthering that compelling governmental interest.

(b) A person whose exercise of religion has been burdened, or is likely to be burdened, in violation of this Act may assert such violation or impending violation as a claim or defense in a judicial proceeding, regardless of whether the State or one of its political subdivisions is a party to the proceeding. The person asserting such a claim or defense may obtain appropriate relief, including relief against the State or its political subdivisions. Appropriate relief includes, but is not limited to, injunctive relief, declaratory relief, compensatory damages, and costs and attorney fees.

H.R. 348, 152d Gen. Assemb., 2015–2016 Sess. (N.C. 2015).

legislation, spoke out against the bill at the time, asking “What’s the problem they’re trying to solve?”<sup>35</sup>

Following over three hours of public comment by nearly 150 supporters and opponents, and with a crowd that spilled into overflow rooms and the outdoor plaza around the building, a vote was called on the ordinance.<sup>36</sup> Prior to voting, each councilmember spoke about the basis for their position. The supporters emphasized respect, equality, and discrimination; the opponents spoke of privacy, safety, and traditional values. Both sides invoked religious principles. The council then voted 7–4 to approve the antidiscrimination ordinance.<sup>37</sup>

### III. THE LEGISLATURE REACTS: THE RUSH TO PASS A SWEEPING PREEMPTION BILL

The passage of the ordinance, which would go into effect on April 1, 2016, triggered an immediate reaction from the state legislature. The day after the vote, Representative Bishop called the city’s action “intentionally provocative,” and House Speaker Tim Moore said the General Assembly would move “to correct this radical course.”<sup>38</sup> Other Republican legislators echoed this sentiment, specifically referencing the restroom provision. Representative Mike Hager said, “[r]estrooms and locker rooms should remain distinctly private.”<sup>39</sup> Speaker Moore’s spokesperson stated that it was specifically the restroom issue “that’s been alarming to people in Raleigh.”<sup>40</sup>

Speaker Moore was adamant that the legislature should convene a special session in order to take action to preempt the Charlotte ordinance before it went into effect.<sup>41</sup> Senate President Pro Tempore Phil Berger and Governor McCrory were reluctant to take that step, however, asserting that the matter could be taken up when the regular legislative session convened on April 25, and noted

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<sup>35</sup> Funk & Morrill, *supra* note 34.

<sup>36</sup> Harrison, *supra* note 32.

<sup>37</sup> *Minutes, Business Meeting*, City Council of the City of Charlotte, North Carolina 96–100 (Feb. 22, 2016), [http://library.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=minutes:charlotte\\_nc](http://library.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=minutes:charlotte_nc).

<sup>38</sup> Steve Harrison & Jim Morrill, *After LBGT Vote, NC House Speaker Says Lawmakers Will ‘Correct This Radical Course,’* CHARLOTTE OBSERVER (Feb. 23, 2016, 9:59 AM), <https://www.charlotteobserver.com/news/politics-government/article61932507.html>.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Colin Campbell, *McCrory, Berger Won’t Call Special NC Legislative Session on Transgender Bathrooms*, NEWS & OBSERVER (Raleigh, N.C.) (Feb. 29, 2016, 5:20 PM), <https://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article63198662.html>.

the cost of a special session—approximately \$42,000 per day.<sup>42</sup> Moore was undaunted, relying on the conservative talking point about sexual predators. “While special sessions are costly, we cannot put a price tag on the safety of women and children . . . .”<sup>43</sup>

In addition to cost, Governor McCrory indicated another reason for his reluctance in calling a special session. He was concerned—presciently—that the General Assembly would use the opportunity to pass something much broader in scope than the controversial restroom portion of the Charlotte ordinance. In rejecting the call for a special session, the Governor’s office wrote that he would support that extraordinary step only if the session was limited to the restroom issue. “However, it is our understanding that the proposal being considered goes beyond the scope of the bathroom issue and includes unrelated subject areas. . . . Anything above and beyond the bathroom (issue) . . . should be dealt with during the full legislative session.”<sup>44</sup> Despite this opposition, on March 21, Speaker Moore and Lieutenant Governor Dan Forest, an outspoken social conservative who, as Lieutenant Governor, also served as president of the Senate, used an arcane constitutional provision to call the legislature into session two days later, on March 23.<sup>45</sup>

Representative Bishop was the lead sponsor of H.B. 2, *An Act to Provide for Single-Sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations*.<sup>46</sup> The bill quickly moved through the House and passed by a wide margin by midday. It similarly raced through the Senate, which passed the bill without making any changes.<sup>47</sup> It was then presented to Governor McCrory, who signed it that evening. H.B. 2 became law at 9:57 p.m. on March 23, 2016, less than 12 hours after it was introduced.<sup>48</sup>

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Jim Morrill, *NC Lawmakers Heading for Special Session Wednesday to Discuss LGBT Ordinance*, NEWS & OBSERVER (Raleigh, N.C.) (Mar. 21, 2016, 7:15 PM), <https://www.newsobserver.com/news/politics-government/state-politics/article67418872.html>.

<sup>45</sup> N.C. CONST. art. II, § 11(2) (“Extra sessions on legislative call. The President of the Senate and the Speaker of the House of Representatives shall convene the General Assembly in extra session by their joint proclamation upon receipt by the President of the Senate of written requests therefor signed by three-fifths of all the members of the Senate and upon receipt by the Speaker of the House of Representatives of written requests therefor signed by three-fifths of all the members of the House of Representatives.”).

<sup>46</sup> H.R. 2, 152d Gen. Assemb., 2d Extra Sess. (N.C. 2016).

<sup>47</sup> *Id.* The bill was only reviewed by one committee in each chamber.

<sup>48</sup> *Id.* The House convened that morning at 10:00 a.m. H. CALENDAR FOR MARCH 23, 2016, 152d Gen. Assemb., 2d Extra Sess. (N.C. 2016), <https://www.ncleg.gov/Files/Calendars/PastCalendars/House/2016/03-23-2016%20House%20cal.pdf>.

*A. The Broad Scope of H.B. 2 Extended Far Beyond Bathrooms*

Although all of the Republican rhetoric leading up to the special session was focused on the issue of transgender access to restrooms, as Governor McCrory predicted, H.B. 2 went much further. The opening “whereas” clauses of the bill were drafted to make clear to the Charlotte City Council—and any other like-minded local governments—that they only had the powers specifically given to them by the grace of the legislature and that *this* legislature had an expansive view of its powers to regulate business and labor in the state (and that local governments were implicitly precluded from advancing a progressive social agenda to the contrary).

Whereas, the North Carolina Constitution directs the General Assembly to provide for the organization and government of all cities and counties and to give cities and counties such powers and duties as the General Assembly deems advisable in Section 1 of Article VII of the North Carolina Constitution; and  
 Whereas, the North Carolina Constitution reflects the importance of statewide laws related to commerce by prohibiting the General Assembly from enacting local acts regulating labor, trade, mining, or manufacturing in Section 24 of Article II of the North Carolina Constitution; and  
 Whereas, the General Assembly finds that laws and obligations consistent statewide for all businesses, organizations, and employers doing business in the State will improve intrastate commerce; and  
 Whereas, the General Assembly finds that laws and obligations consistent statewide for all businesses, organizations, and employers doing business in the State benefit the businesses, organizations, and employers seeking to do business in the State and attracts new businesses, organizations, and employers to the State . . . .<sup>49</sup>

As expected, Part I of the bill focused on the restroom issue. This section begins with “Definitions,” the first of which is “Biological Sex. – The physical condition of being male or female, which is stated on a person’s birth certificate.” The bill then established that “in no event” shall persons be allowed to use a “bathroom or changing facility designated . . . for a sex other than the person’s biological sex.”<sup>50</sup> The law allows schools or other public entities to provide

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<sup>49</sup> H.R. 2, 152d Gen. Assemb., 2d Extra Sess. (N.C. 2016). The reference in the second “Whereas” clause to Article II, Section 24, is particularly ironic. That provision is designed to constrain the legislature from adopting local (as opposed to generally applicable) legislation regarding a range of identified subjects. But in H.B. 2, the General Assembly relies on a constitutional restriction on its own power as a justification for preemption local authority.

<sup>50</sup> *Id.*

“single occupancy” facilities to accommodate “a request due to special circumstances,” but expressly prohibited such accommodations for multi-occupancy facilities.<sup>51</sup> These provisions applied to all local boards of education, all executive branch agencies, all divisions under the Council of State, the judicial branch, the legislative branch, the state university system, and any other political subdivision of the state (which included all municipalities and counties).<sup>52</sup>

These limitations were all included in Part I of H.B. 2, and by their express terms, resolved what legislators had claimed was the problem with Charlotte’s antidiscrimination ordinance. But the General Assembly went much further. Part II of the bill focused on “Statewide Consistency in Laws Related to Employment and Contracting.” The revision contained in the first line of this section made the legislative intent clear—to “Short title and legislative purpose” was added the clause “local governments preempted.”<sup>53</sup> The bill then superseded a range of employment related law:

The provisions of this Article supersede and preempt any ordinance, regulation, resolution, or policy adopted or imposed by a unit of local government or other political subdivision of the State that regulates or imposes any requirement upon an employer pertaining to compensation of employees, such as the wage levels of employees, hours of labor, payment of earned wages, benefits, leave, or well-being of minors in the workforce.<sup>54</sup>

Part III, headed “Protection of Rights in Employment and Public Accommodations,” amended the “Equal Employment Practices” article of the General Statutes to revise the list of protected classes from “sex” to “biological sex.” It also created a new article, titled “Equal Access to Public Accommodations,” restated that the classes protected under this provision included “biological sex,” and then, noted that “designating multiple or single occupancy bathrooms or changing facilities according to biological sex . . . shall not be deemed to constitute discrimination.”<sup>55</sup> These sections went well beyond bathrooms, however, and precluded any possible claims of discrimination based on sexual orientation, gender expression, or gender identity.

But this section of the H.B. 2 pushed employees’ rights back even further, invalidating the existing judicially recognized “public policy exemption”

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> The bill exempted from preemption any local government regulation of its own employees, although the limitations did prevent local governments from imposing any of the prohibited limitations on any private contractor seeking to do business with the local entity. *Id.*

<sup>55</sup> *Id.*

to North Carolina's employment at will paradigm, which allowed employees that had been discriminated against to bring a claim that the adverse action violated the state's public policy against such discrimination.<sup>56</sup> First stating that the regulation of employment discrimination is exclusively a matter for the legislature (and that any related local ordinance or regulation is preempted), H.B. 2 then made explicit that "[t]his Article does not create, and shall not be construed to create or support, a statutory or common law private right of action, and no person may bring any civil action based upon the public policy expressed herein."<sup>57</sup>

*B. The Legislative Debate: Anti-LGBTQ Rhetoric, Local Control, and the Democratic Process*

Representative Bishop introduced the details of the bill on the House floor and was explicit about the intent of the legislation: "[W]e are regulating the field comprehensively. We are preempting the field. That means that localities are not free to adopt a patchwork of inconsistent law governing these business practices across the state."<sup>58</sup> He was immediately challenged on the elimination of the right of an employee to bring a discrimination claim under the public policy exemption. After repeatedly explaining that such an employee could still bring a claim for the "more robust relief" under federal law, he begrudgingly conceded "it's conceivable" that employees would have fewer avenues for legal relief and recovery for discrimination as a result of H.B. 2.<sup>59</sup>

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<sup>56</sup> Before H.B. 2, Section 143-422.2 of the General Statutes of North Carolina stated,

It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees.

It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment foment domestic strife and unrest, deprives the State of the fullest utilization of its capacities for advancement and development, and substantially and adversely affects the interests of employees, employers, and the public in general.

N.C. GEN. STAT. ANN. § 143-422.2 (West 2020).

Although the statute generally paralleled Title VII in scope (e.g., it applied only to employers of 15 or more employees), it created an important state court alternative for plaintiffs and was especially helpful for employees who may have missed the administrative deadlines under the federal law.

<sup>57</sup> H.R. 2, 152d Gen. Assemb., 2d Extra Sess. (N.C. 2016).

<sup>58</sup> OFFICE OF SPEAKER PRO TEM PAUL STAM, N.C. HOUSE OF REPRESENTATIVES, A COLLECTION OF SELECTED DEBATES IN THE NORTH CAROLINA GENERAL ASSEMBLY, 2009–2016, at 417 (2016), <http://paulstam.info/wp-content/uploads/2016/11/Collection-of-Debate-Transcripts-North-Carolina-General-Assembly-2009-2016.pdf>.

<sup>59</sup> *Id.* at 418–20.

When questioned about undermining local authority, Bishop turned his ire on the Charlotte City Council and what he considered its “abuse of authority.” He attacked the council for creating “an ever-expanding list of groups and subgroups and sub-subgroups laid out in the law so that we can divide each other up.”<sup>60</sup> He also implied that unlike state government, with its bicameral legislature, committee structure, and separation of powers, local government was inherently undemocratic because at the local level “you can get a few people to come up and run something through.” He made clear that he considered such unchecked power, like he claimed was exercised in Charlotte, a threat that had to be met head on.

If one political force decides they’re going to take a shortcut and they’re going to try to restructure things or overstep their authority until they’re stopped, then they ought to be stopped for the sake of the institutions that we hold dear. And they’re not just institutions for their own sake, but because they protect our freedom.<sup>61</sup>

When specifically asked to defend his comment that the actions of the Charlotte City Council was “a subversion of law,” Bishop noted that local control is appropriate in some areas, like zoning, but “it is fundamental to the operating of that system properly that authority be delegated and that authority exercised by localities be within their delegated authority. . . . What we’re talking about here is something for which there’s never been a delegation of authority to a locality.”<sup>62</sup> Bishop also pushed back on the idea that the antidiscrimination ordinance was even a local issue and suggested that Charlotte’s action threatened the entire state, which made legislative preemption not only valid but necessary. “[I]t is a matter of statewide interest. It is not something that varies in terms of what is right and just from community to community in how the law can be orderly. We make those decisions as a statewide community . . . .”<sup>63</sup> Republican Majority Leader Paul Stam also emphasized this argument: “That ordinance affected anyone who traveled through Charlotte. It affected all the business owners and non-profit owners because their ‘place of public accommodation’ definition was extremely broad. It affected every business that wants to do business with Charlotte by contracting with Charlotte.”<sup>64</sup> According to Stam, city

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<sup>60</sup> *Id.* at 424.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 425.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 427.



leaders in Charlotte were guilty of “economic imperialism.”<sup>65</sup> The bill passed the House 82–26.<sup>66</sup>

The State Senate took up H.B. 2 at 5:00 p.m. and referred the matter to the Judiciary II committee. After a 45-minute recess, during which the committee reviewed and approved the bill, the full Senate reconvened to debate the measure.<sup>67</sup> In his explanation of the bill, Senator Buck Newton attacked the public accommodations elements of Charlotte’s antidiscrimination ordinance (the bathroom provisions), which he termed “radical political correctness” and “a real public safety risk”:<sup>68</sup>

[T]his standard would allow, as we’ve heard in the media—would allow men into the locker rooms and the bathrooms of females—of our daughters, of our wives. This policy must not be allowed to go forward. And that is why we’re here today, because the City of Charlotte and its City Council have decided that, quite frankly, that they . . . are not really that concerned about public safety of folks that—that go in the bathroom in—in the City of Charlotte. . . . [C]ommon sense tells us that men don’t belong in the ladies’ bathroom. It’s a matter of public safety.<sup>69</sup>

But much more of Newton’s explanation focused on the deriding the Charlotte City Council and how its deliberate and knowing abuse of authority had forced the legislature to call a special session and take this preemptive measure:

[A]s we all know, unfortunately, the City Council of Charlotte lost their mind, and decided to embark upon a very radical course and a—a new—I guess you would call it an ordinance. Something that—that they knew that they didn’t have the authority to do. They didn’t care.

. . . .

. . . [T]he City of Charlotte knew, they acknowledged privately to some folks, and I think there was even some public acknowledgement—they knew they didn’t have the authority to do this. They—they just wanted to do it anyway. And it’s

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<sup>65</sup> *Id.*

<sup>66</sup> H.R. 2, 152d Gen. Assemb., 2d Extra Sess. (N.C. 2016). All Republicans present voted in favor, as did 11 Democrats.

<sup>67</sup> TRANSCRIPT OF THE PROCEEDINGS OF THE FLOOR SESSION, NORTH CAROLINA SENATE, WEDNESDAY, MARCH 23, 2016, at 13 (Brad Worley transcriber, 2016), <https://www.ncleg.net/sessions/2015e2/HB2Transcripts/SenateFloorDebate.pdf>.

<sup>68</sup> *Id.* at 14.

<sup>69</sup> *Id.* at 15–16.

important that we recognize that we live in a state of laws, and we have a Constitution. And it is important that the state have a uniform system of rules—of rules and regulations.

....

... So if the City of Charlotte had listened to the lawyers, who told them not to do it, that they didn't have the authority; if they'd listened to Representative Bishop, who represents part of Charlotte and a very, very smart attorney who sent them a letter detailing to them why this was a bad idea; if they'd listened to the Governor, warned them not to do it, we wouldn't be here today.

....

... I just can't believe that we're here today having to talk about this. But for the City Council of Charlotte, we wouldn't have to talk about these things.<sup>70</sup>

Newton then made clear the preemptive scope and intent of H.B. 2. It would not only “set a statewide standard for who belongs in which bathroom,” but would also “make sure that it's clear that cities and counties don't have the authority to wade into the policies” regarding the terms and conditions of employment in their jurisdictions, including those related to employment discrimination against anyone other than the classes protected under Title VII (with the new amendment that in North Carolina, sex is expressly defined as “biological sex.”).<sup>71</sup>

In rebuttal, Raleigh Senator Dan Blue criticized the bill's proponents attempt to play on public safety fears and “scaring the bejesus out of the citizens of this state.”<sup>72</sup> He also directly challenged the sweeping preemption of the authority of local governments, recognizing their particular and close accountability to residents (words made even more relevant in light of the actions by Charlotte voters in 2015 to elect councilmembers who supported revisiting the antidiscrimination ordinance):

[T]here are 800-plus-thousand people in Charlotte, over a million in Mecklenburg County, and I respect their ability to govern themselves, as they should be able to. And the voters in Charlotte, whether they're afraid of this or anything else, have the ability to put them out of office, which is what they should do if they jeopardize the safety of the citizens of Charlotte.

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<sup>70</sup> *Id.* at 14–16.

<sup>71</sup> *Id.* at 17.

<sup>72</sup> *Id.* at 24.

But it's the broader points that cause me concern, because I think that we are abandoning the fundamental value of limited government and shared government in many ways in this bill. If we proclaim ourselves to be constitutionalists, then we start creating unconstitutional discrimination of any form, then we're being hypocritical.

To rescind local nondiscrimination policies at the local level pulls the rug from under millions of voters across the state that entrust the 500-and-plus local governments that are closer to them to decide best how they want to proceed.<sup>73</sup>

Blue then expressed broader concerns—soon to be realized—about the potential negative impacts of the H.B. 2 on the state as whole. He reminded his colleagues of the pushback and opposition from business and industry following Indiana's adoption of law that similarly excluded LGBTQ persons from protection from discrimination and of growing national criticism of measures like H.B. 2.<sup>74</sup> But in closing he returned to the dangers inherent in the bill's preemptive overreach:

This bill essentially ties a noose around the necks of the cities and counties, and it smothers their ability to govern in the way that their citizens think they ought to.

....

... [Y]ou got a direct assailment on the ability of the people to govern themselves.

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... [W]e're not participating in this effort that you make, to roll back the clock in this state, to take away powers from local governments; not just as it relates to discrimination, but as it relates to their ability to do what we say that we authorize them to do. And ultimately, perhaps it would be best if we started down the road to suspending their charters . . . .<sup>75</sup>

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<sup>73</sup> *Id.* at 23–24.

<sup>74</sup> *Id.* at 25.

<sup>75</sup> *Id.* at 26.

Following Blue's comments, frustrated that they had been completely excluded from the legislative process by the Republican supermajority, all of the Democrats in the Senate left the chamber.<sup>76</sup>

In the last statement before the vote, President Pro Tempore Phil Berger reprised Representative Bishop's argument that the local legislative process followed by the Charlotte City Council was inherently undemocratic and suspect, especially when compared to the operation of the General Assembly. Ignoring the over a year-long process—including several public hearings and an interim municipal election—that led to the adoption of the city's antidiscrimination ordinance, as well as the legislature's one-day rush to pass H.B. 2, Berger claimed:

[O]ne of the interesting facts that has really not been talked about is, we have spent more time, the House and the Senate today, considering, debating, talking about, answering questions, trying to get an understanding of the consequence of the ordinance, and the consequence of this bill, than the City Council of Charlotte spent in adopting the ordinance. There was no committee—no committee to—to review the ordinance. There was no public discussion, as we've—as we've had here. There was no debate back and forth, as we've had here in both the House and the Senate. No. This body has taken a very measured approach to what has been a very radical action by the City Council of Charlotte.<sup>77</sup>

The Senate quickly passed the bill, 32–0,<sup>78</sup> and forwarded it to McCrory, who signed it that evening, a little less than 12 hours after it had been first introduced.<sup>79</sup> Emails later released under the state's Public Records Act revealed that McCrory reviewed polls the night before the special session showing strong support for legislative action to overturn the Charlotte ordinance.<sup>80</sup> Those emails also showed that two days after signing the law, McCrory was still getting information from the legislature about the scope of the bill and why it preempted more than just the bathroom provisions. In one of the emails, Representative Bishop admitted the other restrictions on local governments regarding

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<sup>76</sup> *Id.* at 27.

<sup>77</sup> *Id.* at 30.

<sup>78</sup> H.R. 2, 152d Gen. Assemb., 2d Extra Sess. (N.C. 2016).

<sup>79</sup> *Id.*

<sup>80</sup> Jim Morrill, *A Day Before McCrory Signed HB2, He Got a Poll that Showed It Would Be Popular*, NEWS & OBSERVER (Raleigh, N.C.) (Feb. 16, 2017, 1:41 PM), <https://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article133126854.html>.

employment were not “strictly necessary,” but were nonetheless “well warranted and will be welcomed by businesses.”<sup>81</sup>

#### IV. THE BACKLASH BEGINS: POLITICAL, LEGAL AND ECONOMIC OPPOSITION TO H.B. 2

The reaction against H.B. 2 was immediate and wide ranging. In the week following its passage, the ACLU of North Carolina filed a lawsuit claiming H.B. 2 violated the Equal Protection Clause of the 14th Amendment and Title IX.<sup>82</sup> Several cities, including New York, Seattle, San Francisco, and West Palm Beach, Florida, as well as the State of New York, banned any publicly funded travel to North Carolina.<sup>83</sup> Protests were held in cities across the state, and leading North Carolina corporations and industries expressed concern, including Red Hat, Biogen, Lowe’s, and American Airlines, as well as national companies like Microsoft, Bayer, and Apple.<sup>84</sup>

The intensity of the opposition increased quickly. On April 5, PayPal announced that it was canceling its plans to construct an operations center in Charlotte that was expected to bring a \$3.6 million investment and 400 high-paying jobs to the city.<sup>85</sup> Later that week, opposition to the law again made national headlines when Bruce Springsteen canceled his concert in Greensboro.<sup>86</sup> Then, as Republican state leaders doubled down on their rhetoric about radical agendas, political correctness, and claims about public safety, the Fourth Circuit

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<sup>81</sup> Rick Rothacker, *Two Days After Signing HB2, Gov. McCrory Was Still Receiving Information on the Bill*, CHARLOTTE OBSERVER (Nov. 22, 2016, 5:31 PM), <https://www.charlotteobserver.com/news/politics-government/article116510653.html>.

<sup>82</sup> Complaint at 35, *Carcaño v. McCrory*, 315 F.R.D. 176 (M.D.N.C. 2016). There were three individual plaintiffs in the case; two are transgender. Attorney General Roy Cooper (who declared in late 2015 that he would challenge McCrory for the governorship) then announced that his office would not defend the state in the lawsuit, calling H.B. 2 “a national embarrassment” that permits “broad based discrimination.” Anne Blythe, *NC Attorney General Refuses to Defend State from HB2 Legal Challenge*, NEWS & OBSERVER (Raleigh, N.C.) (Mar. 29, 2016, 12:08 PM), <https://www.newsobserver.com/news/politics-government/state-politics/article68780657.html>.

<sup>83</sup> Colin Campbell, *New York, Four Cities Ban Government Travel to NC over LGBT Law*, NEWS & OBSERVER (Raleigh, N.C.) (Mar. 29, 2016, 1:37 PM), <https://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article68797392.html>.

<sup>84</sup> Katherine Peralta & Rick Rothacker, *Red Hat, Biogen, NCAA Speak Out on NC Law Restricting LGBT Protections*, NEWS & OBSERVER (Raleigh, N.C.) (Mar. 24, 2016, 5:38 PM), <https://www.newsobserver.com/news/business/article68093347.html>.

<sup>85</sup> Rick Rothacker et al., *PayPal Withdraws Plans for Charlotte Expansion over HB2*, CHARLOTTE OBSERVER (Apr. 5, 2016, 10:15 AM), <https://www.charlotteobserver.com/news/business/article70001502.html>.

<sup>86</sup> Mark Berman, *Bruce Springsteen Cancels North Carolina Concert to Protest Bathroom Law*, WASH. POST (Apr. 8, 2016, 7:35 PM), <https://www.washingtonpost.com/news/post-nation/wp/2016/04/08/bruce-springsteen-cancels-n-c-show-to-protest-bathroom-law/>.

ruled that the school district's decision denying Gavin Grimm the right to use the restroom consistent with his gender identity was a violation of Title IX.<sup>87</sup>

This decision brought new legal pressure to the state to defend H.B. 2. On May 4, the U.S. Department of Justice ("DOJ") sent a letter to McCrory notifying him that as a result "of implementation of North Carolina House Bill 2 . . . the State is engaging in a pattern and practice of discrimination against transgender state employees" in violation of federal civil rights law. The State was given until May 9 to respond to the DOJ and explain how it would remedy the violations identified.<sup>88</sup> McCrory, House Speaker Moore, and Senate President Pro Tempore Berger all immediately decried the DOJ finding as a "gross overreach" by the federal government<sup>89</sup> and responded to the May 9 deadline by filing lawsuits challenging the administration's interpretation of the H.B. 2.<sup>90</sup> In response, the DOJ filed its own suit against the State.<sup>91</sup> Announcing the DOJ action, Attorney General Loretta Lynch, a North Carolina native, put the case in the broader context of the struggle against discrimination:

Instead of turning away from our neighbors, our friends, our colleagues, let us instead learn from our history and avoid repeating the mistakes of our past. It was not so very long ago that states, including North Carolina, had signs above restrooms, water fountains and on public accommodations keeping people out based upon a distinction without a difference. We have moved beyond those dark days, but not without pain and

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<sup>87</sup> G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 722 (4th. Cir. 2016), *vacated*, 137 S. Ct. 1239 (2017).

<sup>88</sup> Letter from Vanita Gupta, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Justice, to Pat McCrory, Governor of N.C. (May 4, 2016), <http://media.charlotteobserver.com/static/images/misc/HB2050412.pdf>.

<sup>89</sup> Jim Morrill, *US Justice Department: HB2 Violates Civil Rights Act*, CHARLOTTE OBSERVER (May 4, 2016, 3:31 PM), <https://www.charlotteobserver.com/news/politics-government/article75601912.html>.

<sup>90</sup> Craig Jarvis & Ann Blythe, *Justice Department Sues North Carolina over HB2*, NEWS & OBSERVER (Raleigh, N.C.) (May 9, 2016), <https://www.newsobserver.com/news/politics-government/state-politics/article76502092.html>. The Governor and the legislative leaders filed separate lawsuits against the DOJ. McCrory's claimed that H.B. 2 did not violate any federal civil rights laws; Moore and Berger made those claims as well, but also argued that the DOJ's actions violated the Separation of Powers and Federalism provisions of the U.S. Constitution. *See* Complaint at 2, *McCrory v. United States*, 2016 U.S. Dist. LEXIS 79899 (E.D.N.C. 2016) (No. 5:16CV238BO), <http://media2.newsobserver.com/content/media/2016/5/9/Complaint%20McCrory%20V%20US.A.pdf>; Complaint at 26, *Berger v. U.S. Dep't of Justice*, 2016 WL 3620752 (E.D.N.C. 2016) (No. 5:16CV00240FL).

<sup>91</sup> Complaint at 1, *United States v. North Carolina*, 192 F. Supp. 3d 620 (M.D.N.C. 2016) (No. 1:16CV425).

suffering and an ongoing fight to keep moving forward. Let us write a different story this time.<sup>92</sup>

Under legal scrutiny from the federal government, continuing protests from residents and local governments, questions from leaders of the state university system, and an ever-growing list of boycotts and other adverse economic impacts, pressure was growing to find a way to pull back H.B. 2. Some Charlotte councilmembers and the Charlotte Chamber of Commerce, after meeting with Speaker Moore proposed that, as a first step, the council rescind the antidiscrimination ordinance. Even though the ordinance had been preempted by H.B. 2, the implication was that in return for repealing the ordinance, the legislature would take up amending H.B. 2. However, citing a lack of trust in the legislative leaders, the city council voted not to even take up the issue of repeal.<sup>93</sup> Similar back and forth negotiations between the city and the legislature to resolve the fallout from H.B. 2 would continue over the next ten months.<sup>94</sup>

The economic impacts from H.B. 2 continued unabated. First, the National Basketball Association announced it was pulling the 2017 All-Star Game and all related promotional events out of Charlotte, explaining “we do not believe we can successfully host our All-Star festivities in Charlotte in the climate created by HB2.”<sup>95</sup> And then, in a blow even more politically damaging for H.B. 2 supporters—given the central role of college basketball in the state—the NCAA pulled seven collegiate championship games scheduled in the state over the next year, including men’s college basketball tournament games.<sup>96</sup>

In addition to the growing political and economic pressure of the boycotts and cancellations, in August, the federal district court hearing the ACLU litigation found that the plaintiffs were likely to succeed on their claims of discrimination under Title IX and granted a preliminary injunction against the enforcement of H.B. 2 in the state’s universities while the DOJ case was

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<sup>92</sup> Jarvis & Blythe, *supra* note 90.

<sup>93</sup> Steve Harrison & Mark Price, *Charlotte City Council Rejects Repeal Vote on LGBT Ordinance*, NEWS & OBSERVER (Raleigh, N.C.) (May 23, 2016, 4:48 PM), <https://www.newsobserver.com/news/politics-government/article79370027.html>.

<sup>94</sup> Although no progress was made on the issue of LGBTQ rights until H.B. 2 was finally repealed in 2017, in July 2016 the legislature did restore the right of employees to sue in state court for discrimination in violation of public policy, the abolition of which legislators claimed was unintentional. They did, however, shorten the statute of limitations for such claims to one year. Craig Jarvis, *McCrory Signs Change to HB2 Restoring State Discrimination Lawsuits*, CHARLOTTE OBSERVER (July 18, 2016, 4:47 PM), <https://www.charlotteobserver.com/news/politics-government/article90342262.html>.

<sup>95</sup> *NBA Moves 2017 All-Star Game from Charlotte over HB2 Bill*, ESPN (July 21, 2016), [https://www.espn.com/nba/story/\\_/id/17120170/nba-moving-all-star-game-charlotte-north-carolina-bill](https://www.espn.com/nba/story/_/id/17120170/nba-moving-all-star-game-charlotte-north-carolina-bill).

<sup>96</sup> Andrew Carter, *NCAA Pulls Championship Events from North Carolina over HB2*, CHARLOTTE OBSERVER (Sept. 12, 2016, 8:09 PM), <https://www.charlotteobserver.com/sports/article101464492.html>.

pending.<sup>97</sup> In its ruling, the court noted the State had failed to provide any evidence to support its claims about public safety “despite having four months between the filing of this lawsuit and the hearing on this motion to do so. Indeed, the court does not even have a legislative record supporting the law to consider.”<sup>98</sup> Despite the order, Moore, Berger, and McCrory all highlighted that its scope was limited and that H.B. 2 remained in force.<sup>99</sup>

#### V. H.B. 2 IS (SORT OF) REPEALED BY COMPROMISING ON CIVIL RIGHTS

Even while defending H.B. 2 publicly, McCrory was searching for a way to resolve the matter quickly. He was in the final months of a tight race for reelection against Attorney General Roy Cooper, who had made the Governor's support for H.B. 2 a central focus of the campaign. In September, McCrory dropped his lawsuit against the federal government, citing “substantial costs.”<sup>100</sup> He then participated in another attempt to negotiate a solution between the state and Charlotte, this one presented by the North Carolina Restaurant and Lodging Association, which had been working with legislators and the Governor's office. Like the proposal floated in March, this one promised that if the city council would vote to rescind its (preempted) antidiscrimination ordinance, then the Governor would call the legislature back into session, where he was assured there was a majority ready to repeal H.B. 2. But there was no question—the city would have to act first.<sup>101</sup> Like the previous proposal, supporters of the ordinance were skeptical that the legislature would follow through, although leaders from the Restaurant Association insisted that legislators were willing to compromise and that the deal was for full repeal.<sup>102</sup> Despite these assurances, Mayor Jennifer Roberts announced that the city council would not consider rescinding the ordinance. Although she gave credit to the governor “for recognizing the state

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<sup>97</sup> Carcaño v. McCrory, 203 F. Supp. 3d 615, 654 (M.D.N.C. 2016).

<sup>98</sup> *Id.* at 625.

<sup>99</sup> Anne Blythe, *HB2 Blocked in Part by US Judge Before Trial*, NEWS & OBSERVER (Raleigh, N.C.) (Aug. 26, 2016, 6:21 PM), <https://www.newsobserver.com/news/politics-government/state-politics/article98180087.html>.

<sup>100</sup> Michael Stratford, *North Carolina Drops Suit Against Obama Administration over 'Bathroom Bill,'* POLITICO (Sept. 19, 2016, 5:35 PM), <https://www.politico.com/story/2016/09/north-carolina-obama-bathroom-bill-lawsuit-228381>.

<sup>101</sup> Colin Campbell et al., *Governor's Office: HB2 Repeal Possible If Charlotte Drops LGBT Ordinance First*, NEWS & OBSERVER (Raleigh, N.C.) (Sept. 16, 2016, 3:06 PM), <https://www.newsobserver.com/news/politics-government/state-politics/article102251942.html>. The regular legislative session adjourned on July 1, 2016.

<sup>102</sup> *Id.*



should overturn HB2,” she insisted that it was the state’s responsibility to act, not the city’s.<sup>103</sup>

*A. McCrory Loses the Election but Makes a Lame Duck Attempt to Repeal H.B. 2*

In November, McCrory was narrowly defeated by Roy Cooper, and many believed that his support for H.B. 2 cost him the governorship.<sup>104</sup> Even before taking office, Governor-elect Cooper began efforts to engineer a repeal of H.B. 2, the promise of which was a core element of his campaign. To do so, Cooper resurrected the strategy that had twice failed—first the Charlotte City Council rescinds its human rights ordinance, then a special legislative session to repeal H.B. 2. Given the fate of the previous attempts, the Governor-elect himself and members of his staff took time to lobby members of the council.<sup>105</sup> Despite rejecting a similar proposal in March and again in September, on December 19 the Charlotte City Council voted 10–0 to rescind its nondiscrimination ordinance. Defending the reversal of its previous position, councilmembers said they believed the assurances and commitment from the state to act on H.B. 2 were firmer this time. Mayor Jennifer Roberts also highlighted Cooper’s election as a critical factor. “We have a change in our political climate. We have a split government.”<sup>106</sup> Despite this optimism, the resolution included a conditional provision that its rescission of the ordinance would be invalid if H.B. 2 were not repealed in its entirety by December 31, 2016.<sup>107</sup>

The council’s caution proved well-founded. Following the action by the city council, Governor McCrory called a special session of the General Assembly to repeal H.B. 2, which convened on December 21. The day before however, state Republican legislators raised concerns that the city council “lied to the public about a full repeal” of its ordinance and that this action “seriously harmed

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<sup>103</sup> Chris Johnson, *Charlotte Won’t Rescind LGBT Ordinance in HB2 Compromise*, WASH. BLADE (Sept. 19, 2016, 2:23 PM), <https://www.washingtonblade.com/2016/09/19/charlotte-wont-rescind-lgbt-ordinance-hb2-compromise/>.

<sup>104</sup> Jim Morrill, *Tolls – and HB2 – Became Roadblocks for Pat McCrory*, NEWS & OBSERVER (Raleigh, N.C.) (Nov. 9, 2016, 5:49 PM), <https://www.newsobserver.com/news/politics-government/election/article113752089.html> (“According to an exit poll Tuesday, 66% of North Carolina voters said they oppose the law.”).

<sup>105</sup> Steve Harrison & Jim Morrill, *Charlotte City Council Twice Rejected a Deal on HB2. What Changed?*, NEWS & OBSERVER (Raleigh, N.C.) (Dec. 19, 2016, 6:36 PM), <https://www.newsobserver.com/news/politics-government/state-politics/article121877098.html>.

<sup>106</sup> *Id.*

<sup>107</sup> *Minutes, Special Meeting of the City Council of the City of Charlotte, N.C., on Wednesday, December 21, 2016*, in MINUTE BOOK 141, at 755–57 (Dec. 21, 2016), [http://library.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=minutes:charlotte\\_nc](http://library.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=minutes:charlotte_nc).

HB2 repeal efforts.”<sup>108</sup> In response, the city council held an emergency early-morning meeting the day of the special session and repealed the antidiscrimination ordinance in its entirety.<sup>109</sup>

The city's quick action proved fruitless, however. Relying on the allegation that the city had initially misled the legislature, President Pro Tempore Berger introduced a repeal bill that included a “Six-Month Cooling-Off Period” prohibiting a local government from enacting any ordinance regarding employment practices or public accommodations, including access to restrooms.<sup>110</sup> Cooper was infuriated by the addition of this language. Asserting that “Republican legislative leaders have broken their word to me” to repeal H.B. 2 in full, he urged Democrats in the Senate to vote against the bill.<sup>111</sup> Berger insisted that the moratorium was necessary because he didn't trust the city not to immediately reinstate the ordinance.<sup>112</sup> The debate on the Senate floor followed partisan lines, with Democrats arguing that the legislature was reneging on its commitment in light of the city's vote on its ordinance, and Republicans insisting that the city had acted in bad faith and that the moratorium was necessary to prevent Charlotte and other cities from adopting any similar ordinances. The bill with the moratorium included was opposed by Democrats, as well as by some Republicans who opposed any repeal, and failed 16–32. It was never even considered by the House, and the special session ended with H.B. 2 intact.<sup>113</sup>

#### *B. Governor Cooper Makes Repeal of H.B. 2 Top Priority but the Legislature Resists*

Roy Cooper took office on January 1, 2017, and the General Assembly convened a few weeks later, with the Republican supermajority still in full effect. H.B. 2 repeal was at the top to the new Governor's agenda; there were also continuing economic pressures to address the law, including the pending NCAA announcement of the locations for its championship games for the next five years. Legislative leaders made clear however that there were not enough votes

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<sup>108</sup> Ely Portillo, *HB2 Deal's Collapse Followed 4 Days of Maneuvering*, CHARLOTTE OBSERVER (Dec. 21, 2016, 7:40 PM), <https://www.charlotteobserver.com/news/local/article122325299.html> (The legislators claimed that the city's action addressed the bathroom issue but still left employment protections for the protected classes that had been added, i.e., gender identity, gender expression, and sexual orientation.).

<sup>109</sup> *Id.*

<sup>110</sup> S. 4, 152d Gen. Assemb., 5th Extra Sess. (N.C. 2016).

<sup>111</sup> Colin Campbell, *Republicans 'Have Broken Their Word' on HB2, Roy Cooper Says*, NEWS & OBSERVER (Raleigh, N.C.) (Dec. 22, 2016, 12:04 PM), <https://www.newsobserver.com/news/politics-government/state-politics/article122418814.html>.

<sup>112</sup> *Id.*

<sup>113</sup> Bruce Henderson & Jim Morrill, *NC Senate Votes Down Repeal of HB2; House Doesn't Vote; Special Session Adjourns*, NEWS & OBSERVER (Raleigh, N.C.) (Dec. 21, 2016, 7:24 AM), <https://www.newsobserver.com/news/politics-government/state-politics/article122147359.html>.

to pass a simple repeal and that any compromise must include language “that keeps women from being forced to share bathrooms and shower facilities with men.”<sup>114</sup> While this remained the lead talking point for repeal opponents, it was clear that the primary concern for Republican legislators was preventing local governments from adopting new, pro-LGBTQ antidiscrimination measures.

### 1. Multiple Proposals for H.B. 2 Repeal Turn on the Issue LGBTQ Rights

Democrats introduced three different repeal bills: one was a simple repeal of H.B. 2;<sup>115</sup> another included adding sexual orientation and gender identity to state antidiscrimination law (and that “places of public accommodation . . . shall provide access to [restroom] facilities based on a person’s gender identity”);<sup>116</sup> a third was similar to the second but, in an attempt to address Republican criticisms, also included additional penalties for crimes committed in restrooms.<sup>117</sup>

The Governor would not specifically comment on any of these proposals, but shortly after their introduction, Cooper and Democratic legislative leaders announced an alternative plan that included repeal, increased criminal penalties for crimes committed in restrooms, and a requirement that local governments give 30-day notice to the public and the legislature before adopting any antidiscrimination ordinances. This “cooling off” period was intended to placate Republican concerns about “rogue” local governments. Cooper said the “30-day notice plan would ensure that local nondiscrimination proposals would be carefully considered and thoroughly debated before any vote.”<sup>118</sup> In response, a bill with bipartisan sponsorship was introduced which repealed H.B. 2, established that the legislature had exclusive authority to regulate access to restrooms, and required that any local antidiscrimination ordinance be subject to a referendum.<sup>119</sup> Cooper and Democrats quickly rejected the proposal, but Republican proponents insisted it was necessary to secure enough votes for repeal and because “[t]here needs to be some check on the power of city councils.”<sup>120</sup>

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<sup>114</sup> Colin Campbell, *New HB2 Repeal Plan from Democrats Would Add Nondiscrimination Protections*, NEWS & OBSERVER (Raleigh, N.C.) (Feb. 10, 2017, 10:42 AM), <https://www.newsobserver.com/news/politics-government/state-politics/article131657324.html>.

<sup>115</sup> S. 25, 153d Gen. Assemb., 2017–2018 Sess. (N.C. 2017).

<sup>116</sup> H.R. 82, 153d Gen. Assemb., 2017–2018 Sess. (N.C. 2017).

<sup>117</sup> H.R. 78, 153d Gen. Assemb., 2017–2018 Sess. (N.C. 2017).

<sup>118</sup> *Cooper Proposes New HB2 Repeal Deal*, WRAL.COM (Feb. 14, 2017), <https://www.wral.com/cooper-proposes-new-hb2-repeal-deal/16528667/>.

<sup>119</sup> H.R. 186, 153d Gen. Assemb., 2017–2018 Sess. (N.C. 2017).

<sup>120</sup> Colin Campbell, *Cooper Blasts HB2 Compromise’s Referendum Provision: ‘Like Putting the Civil Rights Act to a Popular Vote,’* NEWS & OBSERVER (Raleigh, N.C.) (Feb. 26, 2017, 5:47

Economic pressure to reach some kind of compromise continued to build, with the NCAA announcing that if the H.B. 2 wasn't repealed by the end of March, the state would be ineligible to host any collegiate championship events for the next five years, a potential economic impact of approximately half a billion dollars.<sup>121</sup> As the month came to a close however, both sides seemed unwilling to budge: Democrats continued to demand a clean repeal; Republicans remained intransigent that cities be constrained from pushing LGBTQ rights. Speaker Moore suggested that any repeal legislation include a "conscience protection provision" that would allow individuals to sue the state if they believed some government action interfered with their religious rights. Opponents countered that such measures would legitimize discrimination against the LGBTQ community.<sup>122</sup>

Finally, with just a day left before the NCAA deadline, the Senate took up H.B. 142, a completely unrelated bill that passed the House in early March, gutted its contents entirely, and replaced it with a repeal proposal that had been worked out in intense negotiations between Cooper, Moore, and Berger, who later said they had been assured the new law would satisfy the NCAA. The bill was drafted and approved by the Senate in the morning, approved by the House at 1:33 p.m., then signed by the Governor just before 4:00 p.m. A little over a year after its passage, H.B. 2 was officially repealed.<sup>123</sup>

## 2. H.B. 142: A Moratorium on Protecting LGBTQ Rights

H.B. 142 contained just three basic elements. First, it repealed H.B. 2. Second, it preempted all "regulation of access to multiple occupancy restrooms, showers, or changing facilities, except in accordance with an act of the General Assembly." Lastly, it also prohibited local governments from taking any action to "regulate private employment practices or regulating public accommodations" until December 1, 2020.<sup>124</sup>

While Cooper and legislative leaders defended H.B. 142 as the best that could be done, the compromise was publicly attacked by both conservative and

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PM), <https://www.newsobserver.com/news/politics-government/state-politics/article135132119.html>.

<sup>121</sup> Ralph Ellis, *'Bathroom Bill': NC Could Lose More NCAA Events, Sports Group Says*, CNN, <https://www.cnn.com/2017/02/10/us/bathroom-bill-north-carolina-ncaa-lgbt/index.html> (last updated Feb. 10, 2017, 7:25 PM).

<sup>122</sup> Jim Morrill & Colin Campbell, *NCAA Gives North Carolina a Deadline to Repeal HB2 or Lose Events Until 2022*, NEWS & OBSERVER (Raleigh, N.C.) (Mar. 24, 2017, 6:10 AM), <https://www.newsobserver.com/news/politics-government/state-politics/article140505218.html>.

<sup>123</sup> Craig Jarvis et al., *HB2 Off the Books as Gov. Roy Cooper Signs Compromise into Law*, NEWS & OBSERVER (Raleigh, N.C.) (Mar. 30, 2017, 1:36 PM), <https://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article141716579.html>.

<sup>124</sup> H.R. 142, 153d Gen. Assemb., 2017–2018 Sess. (N.C. 2017).

progressive advocacy groups.<sup>125</sup> The former condemned the legislature for giving in to pressure from the NCAA and failing to protect privacy rights by eliminating the mandate that access to bathrooms be restricted to biological sex. LGBTQ groups called the compromise “shameful” and argued that the moratorium on local antidiscrimination ordinances would lead to further marginalization and discrimination against the LGBTQ community.<sup>126</sup>

Although Cooper and other Democrats tried to portray the deal as a civil rights victory (asserting that it removed bathroom restrictions and highlighting that it did not include any referendum requirements or religious freedom provisions),<sup>127</sup> it is impossible to reconcile that conclusion with the almost three-year blanket preemption of any local legislation to protect LGBTQ residents or workers (especially considering that a six-month moratorium was rejected by the Governor just a few months earlier). And while the NCAA agreed to come back to North Carolina a few weeks after the deal was announced,<sup>128</sup> there was no way to positively spin the reality that H.B. 142 prohibited any state agency, school district, or local government from passing LGBTQ inclusive policies regarding public accommodations or protection from discrimination, or that the long moratorium on local civil rights or workers’ rights ordinances could readily be extended any time prior to its sunset date. It is also worth noting that, from a purely procedural perspective, H.B. 142 shared the troubling behind-closed-doors and rushed and unusual legislative treatment as its progenitor, further undermining public support.

## VI. THE STRUGGLE OVER H.B. 2 EXEMPLIFIES THE CHALLENGES TO EXPANDING CIVIL RIGHTS AND THE INHERENTLY UNDEMOCRATIC NATURE OF STATE LEGISLATIVE PREEMPTION

In many ways, North Carolina’s experience with H.B. 2 was similar to other primarily partisan preemption battles happening between conservative state legislatures and more progressive local governments across the country at the

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<sup>125</sup> The votes in the Senate and House reflected these divisions, with conservative Republicans joining progressive Democrats in opposing the bill. *See* House Roll Call Vote, H.B. 142, 153d Gen. Assemb., 2017–2018 Sess. (N.C. 2017), <https://www.ncleg.gov/Legislation/Votes/RollCallVoteTranscript/2017/H/144>; Senate Roll Call Vote, H.R. 142, 153d Gen. Assemb., 2017–2018 Sess. (N.C. 2017), <https://www.ncleg.gov/Legislation/Votes/RollCallVoteTranscript/2017/S/50>.

<sup>126</sup> Mark Price, *NC’s HB2 Compromise Called ‘Fake Repeal,’ Angers Liberals and Conservatives Alike*, CHARLOTTE OBSERVER (Mar. 30, 2017, 6:05 AM), <https://www.charlotteobserver.com/news/local/article141638439.html>.

<sup>127</sup> *House Bill 2 Repeal Fact Sheet*, OFF. GOVERNOR ROY COOPER (Mar. 30, 2017), [https://files.nc.gov/governor/documents/files/HB2\\_Repeal\\_Fact\\_Sheet\\_1\\_0.pdf](https://files.nc.gov/governor/documents/files/HB2_Repeal_Fact_Sheet_1_0.pdf).

<sup>128</sup> Marc Tracy, *N.C.A.A. Ends Boycott of North Carolina After So-Called Bathroom Bill Is Repealed*, N.Y. TIMES (Apr. 4, 2017), <https://www.nytimes.com/2017/04/04/sports/ncaa-hb2-north-carolina-boycott-bathroom-bill.html>.

time.<sup>129</sup> But the fundamental nature of the civil rights issues at stake, as well as the political dynamics in the state, provide some important insights. The overall framework for the debate over preemption is local control and the responsiveness of local governments as contrasted against the importance of general uniformity in matters of statewide interests. But North Carolina's experience with H.B. 2 also brought to the forefront issues related to expanding civil rights for historically discriminated-against groups, the manipulation of rhetoric regarding the democratic process, overt appeals to homo- and transphobic biases, and the impacts of gerrymandering.

*A. The Political Process Should Provide an Avenue to Expand the Rights of Marginalized Groups*

In the current social and legal context regarding the protection or expansion of civil rights for historically marginalized classes, the significance of local political engagement is substantially increased. Historically, for groups that have been discriminated against and excluded from full participation in society, the courts have been the primary vehicle for securing equal rights. Litigation expanding equal access to the benefits and privileges of inclusion in the political and social community often came in response to legislative measures expressly designed to maintain the subordination of disfavored groups. In fact, the foundation of modern equal protection jurisprudence, the notorious "Footnote 4," specifically highlighted the significance of the judiciary's role when entrenched discrimination against minority groups undermines the ability of "political processes" to protect the rights of those groups.<sup>130</sup>

As courts have grown more conservative and increasingly hostile to civil rights claims, and as overt discrimination against the LGBTQ community in general and the transgender community in particular has become a focal point in the ongoing national debates in America, LGBTQ advocates turned to political engagement at the local level to secure antidiscrimination protections.<sup>131</sup> And while litigation remains a tool for securing change, the passage of local legislation brings with it additional institutional impacts that a favorable court ruling does not. The adoption of broader antidiscrimination ordinances represents the popular and public endorsement of the inclusion of LGBTQ residents in the full measure of membership in the community. By facilitating (and validating) that inclusion, local governments challenge the institutionalized discrimination upon which the exclusion of LGBTQ persons (and historically,

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<sup>129</sup> Henry Grabar, *The Shackling of the American City*, SLATE (Sept. 10, 2016, 5:53 AM), <https://slate.com/business/2016/09/how-alec-acce-and-pre-emptions-laws-are-gutting-the-powers-of-american-cities.html>.

<sup>130</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>131</sup> MOVEMENT ADVANCEMENT PROJECT, *THE POWER OF STATE PREEMPTION: PREVENTING PROGRESS AND THREATENING EQUALITY* 3-4 (2018), <https://www.lgbtmap.org/file/Preemption-Report-FINAL.pdf>.

other marginalized groups) is based: that they are inferior, dangerous, subordinate, and unworthy of sharing the rights and benefits of the general community. These ordinances—which as the actions of the city represent the collective will of the jurisdiction are an affirmation of just the opposite—that these residents are, like the rest of us, full and equal members of our community.

This is what makes these local ordinances so threatening to those vested in maintaining the status quo. Continuing to deny equal treatment and inclusion to minority groups depends on that rhetoric of “otherness” and the concomitant notion that those others are to be shunned or rejected, and that their attempts to seek inclusion are threats to the rights or values of those already included. The adoption of local ordinances that extend civil rights protections to LGBTQ residents sends a powerful message that defies the institutionalized “norms” that prop up their exclusion, because it reflects acceptance accomplished through the political processes. With these ordinances, greater equality is not merely achieved from the outside with pressure from those excluded; but also from the inside, with pressure by those already included and who, by virtue of their inclusion (their privilege), have the power to control access to equal treatment in the political community. More plainly, the inclusion of sexual orientation, gender identity, and gender expression in Charlotte’s antidiscrimination ordinance meant anti-LGBTQ prejudice would no longer be the accepted social practice of that community and would no longer be insulated from the law. More significantly, this was not a decision imposed externally on the community by a legal decision, but one that emerged organically from the local officials chosen by the residents as their representatives.

### *B. Propping Up Exclusion*

Because of the particularly powerful ramifications for institutionalized exclusion that the Charlotte ordinance created, the rhetoric used to justify legislative preemption focused on both the idea that the city process was somehow undemocratic, and that the underlying substantive issue was not equal rights, but the protection of public safety. The former relied on elemental misrepresentations of the political process; the latter on hateful stereotypes of transgender people as dangerous sexual predators.

#### *1. The Legislature’s H.B. 2 Debate Offers a Prime Example of the Manipulation of Political Rhetoric*

A core theme of H.B. 2 sponsor Representative Dan Bishop’s comments on the floor of the House was that the passage of the city’s antidiscrimination ordinance was “the picture of the subversion of the rule of law” and “an abuse of authority.” In his words, what happened in Charlotte was “a neat trick” foisted off on the people of the city by a few rogue extremists.

Let's just go to a city council where you can find a handful of radicals under the influence of an activist group. It's got a lot of money from out of state. And get six of those people to enact something that goes to the heart of some . . . statewide interest.<sup>132</sup>

Bishop contrasted this renegade policymaking with the careful deliberative process of the legislature, with its complicated committee system which tests and vets each bill before it makes it to the floor, where it is tested again, and then if successful, has to do it all over again in the Senate.<sup>133</sup>

The actual process that the city went through in adopting the antidiscrimination ordinance was ignored or grossly misrepresented by H.B. 2 proponents during the short legislative debate. There was no acknowledgment that community advocates seeking to secure the expansion of civil rights lobbied their elected representatives; that those representatives then held public input sessions to get feedback from the community on the proposed changes; or that hundreds of residents attended and spoke at public hearings and sent thousands of emails. H.B. 2's sponsors discounted the fact that the ordinance was voted down at its first hearing in March 2015, and that following that vote residents worked for months to make the ordinance a focal point of the upcoming municipal elections. They insisted that candidates specifically make public their position on the issue, and then in November elected a council committed to supporting the changes the previous council rejected. These facts were also conveniently ignored.<sup>134</sup>

What happened in Charlotte was, by any measure, the essence of the democratic process and, despite Representative Bishop's protest to the contrary, a compelling counterpoint to the General Assembly's 12-hour introduction, discussion, and passage of H.B. 2.<sup>135</sup> Nevertheless, defenders of preemption continued to mischaracterize the city's action as undemocratic, not only (they claimed) because it was unsupported by residents there, but also by insisting that this expressly local ordinance in fact had sweeping impacts across the state. By recasting the matter as having broad statewide effects, the legitimate operation of the political processes of local government could be further discredited.

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<sup>132</sup> TRANSCRIPT OF THE PROCEEDINGS OF THE FLOOR SESSION, DEBATE ON HOUSE BILL 2, N.C. HOUSE OF REPRESENTATIVES, WEDNESDAY, MARCH 23, 2016, at 53 (Brad Worley transcriber, 2016), <https://www.ncleg.gov/sessions/2015e2/HB2Transcripts/HouseFloorDebate.pdf>.

<sup>133</sup> *Id.*

<sup>134</sup> *See supra* Part III.

<sup>135</sup> Although President Pro Tempore Berger, without a trace of irony, asserted partway through the only day of the special session considering H.B. 2 that the General Assembly had already devoted more thought and consideration to the issue than the City of Charlotte. *See* TRANSCRIPT, *supra* note 67, at 28–30.



## 2. The Overt Discrimination Against Transgender Persons

The other component of the arguments in defense of H.B. 2 was the overtly bigoted characterization of transgender persons. Political opponents of expanding LGBTQ rights—including the Governor, legislative leaders, and conservative activists—all pushed a fear-based narrative that the Charlotte antidiscrimination ordinance would make women and children vulnerable to sexual predators stalking women’s restrooms.<sup>136</sup> And even if they didn’t make the connection explicit, the clear message was that the people whose rights the antidiscrimination ordinance was meant to protect were in fact dangerous, deviant criminals that the public needed protection from. During the H.B. 2 debates, Senators warned that “men don’t belong in the ladies’ bathroom. . . . [A]nyone . . . with that intent[] could use the Charlotte ordinance as an excuse to be somewhere that we all know they don’t belong.”<sup>137</sup> President Pro Tempore Berger stressed that “we are not going to put our citizens in further danger,” and that with regard to transgender persons, they would not require police to try “to determine whether or not someone thinks they’re a man, or thinks they’re a woman.”<sup>138</sup>

These sentiments reflected prejudiced comments and anti-LGBTQ stereotypes made during the city’s consideration of the ordinance and also by conservative advocacy groups opposed to LGBTQ civil rights. The rhetoric expressly played on fears of sexual predators dressed as women and stalking bathrooms, which was presented as the inevitable outcome of the expansion of the city’s civil rights ordinance to include LGBTQ residents. The public safety narrative was designed to maintain the idea that gay people, and particularly transgender people, are inherently dangerous to the rest of the community, and are therefore unworthy of the benefits and protections of antidiscrimination law. In addition to propping up the continued marginalization of the LGBTQ community, this discriminatory framing of the issue ignored the well-documented rates of violence against transgender persons, the heightened vulnerability to such violence such persons would likely face if prohibited from using the restroom that corresponds to their gender identity, as well as the fact that there had been no increase in sex related crimes in restrooms in the hundreds of cities that had adopted such ordinance.<sup>139</sup>

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<sup>136</sup> In addition to being anti-transgender, these arguments also reflected the sexist construct that it was the duty of the legislature to protect the bathrooms “of our daughters, of our wives.” *Id.* at 15.

<sup>137</sup> *Id.* at 16.

<sup>138</sup> *Id.* at 29.

<sup>139</sup> See, e.g., TIMOTHY WANG ET AL., STATE ANTI-TRANSGENDER BATHROOM BILLS THREATEN TRANSGENDER PEOPLE’S HEALTH AND PARTICIPATION IN PUBLIC LIFE (2016), [https://fenwayhealth.org/wp-content/uploads/2015/12/COM-2485-Transgender-Bathroom-Bill-Brief\\_v8-pages.pdf](https://fenwayhealth.org/wp-content/uploads/2015/12/COM-2485-Transgender-Bathroom-Bill-Brief_v8-pages.pdf); Will Doran, *Equality NC Director: No Public Safety Risks in Cities with Transgender Anti-discrimination Rules*, POLITIFACT (Apr. 1, 2016),

C. *The Role of Gerrymandering, Partisanship, and the Rural–Urban Divide*

The legislature's sweeping preemptive attack on Charlotte's antidiscrimination ordinance was consistent with a broader strategy by the conservative, Republican-controlled General Assembly to limit the powers of local governments, and particularly those in more progressive, urban areas. Gerrymandered electoral districts—later ruled unconstitutional<sup>140</sup>—concentrated legislative power in the hands of rural representatives who exercised that power to exploit the rural-urban divide in the state to maximize partisan advantage.

In 2010, Republicans took control of the North Carolina General Assembly for the first time in over a century, and in 2011 adopted a gerrymandered redistricting plan that created Republican supermajorities in both chambers in 2012.<sup>141</sup> What followed was a wave of conservative legislation that included restrictions on voting, the expansion of charter schools, the creation of a taxpayer-funded private-school voucher program, cuts to higher-education funding, and rollbacks of corporate taxes and environmental regulations.<sup>142</sup>

The legislature also initiated a spate of legislation specifically targeting local governments in Democrat-controlled cities and counties. Several of these bills led to litigation, often ending in a determination that the legislature had overreached. In 2013 the legislature passed a bill requiring the City of Asheville to transfer its water and sewer system to state-created regional district, thereby stripping the city of not only its ownership of the infrastructure but of its ability to control the system. The state supreme court ruled that the legislature's action was unconstitutional.<sup>143</sup> Also in 2013, the legislature unilaterally redrew electoral districts for the Wake County Board of Education, and two years later adopted an identical electoral plan for the Wake County Board of Commissioners.<sup>144</sup> Both boards had been controlled by Democrats; the state-mandated redistricting, which was designed to create an advantage for Republican candidates, was pushed through the legislature without any consultation with the impacted boards or with the community. Because the new plan overpopulated Democratic

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<https://www.politifact.com/north-carolina/statements/2016/apr/01/chris-sgro/equality-nc-director-no-public-safety-risks-cities/>; German Lopez, *Myth #3: Letting Trans People Use the Bathroom or Locker Room Matching Their Gender Identity Is Dangerous*, VOX (Nov. 14, 2018, 4:09 PM), <https://www.vox.com/identities/2016/5/13/17938102/transgender-people-bathrooms-locker-rooms-schools>.

<sup>140</sup> See *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017).

<sup>141</sup> Chris Kardish, *How North Carolina Turned So Red So Fast*, GOVERNING (July 2014), <https://www.governing.com/topics/politics/gov-north-carolina-southern-progressivism.html>.

<sup>142</sup> *Id.*

<sup>143</sup> *City of Asheville v. State*, 794 S.E.2d 759, 774 (N.C. 2016).

<sup>144</sup> Wake County is home to the City of Raleigh, the state capital and the state's second largest municipality. Stephen R. Walston, *Learn About Wake County*, WAKEGOV.COM (May 9, 2016) <http://www.wakegov.com/about/facts/Pages/default.aspx>.

districts and underpopulated Republican ones, the Fourth Circuit held that it violated the constitutional “one person—one vote” mandate.<sup>145</sup> A similar 2015 state law altering the electoral process for the mayor and city council of Greensboro (another Democratic stronghold) was also struck down as an unconstitutional overreach.<sup>146</sup>

The passage of Charlotte’s antidiscrimination ordinance created a perfect opportunity for the Republican-controlled General Assembly to achieve several of its goals: to pushback against the expansion of LGBTQ rights, to energize its conservative base with a controversial social issue, and to further constrain the powers of local governments—especially those in more progressive urban cities and counties controlled by Democrats. The inclusion in H.B. 2 of restrictions on any local legislation affecting wages, working conditions, or other rights for employees; as well as provisions undercutting state antidiscrimination law, revealed that the law was about more than restrooms. Finally, the legislature’s contempt for progressive local governments is perhaps best illustrated by its insistence that the city “back down” and admit it was wrong by rescinding its already preempted antidiscrimination ordinance before any H.B. 2 repeal would even be considered.

## VII. CONCLUSION

At its most basic level, North Carolina’s struggle over H.B. 2 looked a lot like other preemption battles being waged across the country between more progressive local governments and more conservative state legislatures, several of which involved workers’ rights, gun control, or environmental protections. But the controversy over H.B. 2 was unique in that at its core was the recognition of fundamental civil rights and equitable social inclusion for the LGBTQ community; and more importantly, that this recognition came through the traditional political process and therefore with the approval of the community at large. In that regard, in the national backlash it engendered, and in the ignominious way it was ultimately repealed, H.B. 2 highlighted the fundamentally undemocratic essence of the legislature’s preemptive actions.

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<sup>145</sup> *Raleigh Wake Citizens Ass’n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 354 (4th Cir. 2016).

<sup>146</sup> *City of Greensboro v. Guilford Cty. Bd. of Elections*, 248 F. Supp. 3d 692, 705 (M.D.N.C. 2017). Not all attempts to check the legislature in its targeting of progressive municipalities were successful; however, the N.C. Supreme Court affirmed the right of the General Assembly to strip the Town of Boone of its extraterritorial jurisdiction, a power otherwise available to any municipality in the state. *See Town of Boone v. State*, 794 S.E.2d 710, 712 (N.C. 2016).